

REPUBLICANISM AND MINIMAL ENTITLEMENTS:  
OF SAFETY VALVES AND THE SAFETY NET

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The title of today's panel discussion is "The Takings Clause, the Contracts Clause and Other Economic Rights Provisions of the Constitution." I would like to focus on the word "other" and talk about some provisions of the Constitution that are not typically thought of as economic provisions.

Professor Eule set out a nice account of the procedural requisites of a democracy that abides by the rule of law: procedural requisites captured under notions of prospectivity, generality, and nondiscrimination. The prospectivity requirement can be seen in the contracts clause and the ex post facto clause; the generality requirement can be seen in the takings clause; the nondiscrimination principle is found in the privileges and immunities clause and the dormant commerce clause, if such a beast exists.

I would like to go beyond the procedural requisites of a working democracy and talk about the substantive social and economic requirements of a healthy democracy. In two words, I would like to talk about education and property. My thesis, simply put, is that it is very difficult for a democracy to operate properly if it lacks a middle class, or at least a lower middle class. It is very difficult for a democracy to function if the citizenry is illiterate and without any economic independence.

This is, I think, a widely held view among modern historians, sociologists, and political scientists. Consider Barrington Moore of Harvard and his research on the social and economic origins of dictatorship and democracy, or engage in a casual inspection of current world events. What we are seeing today in Africa, in the Philippines, in Latin America, even in India, is the real difficulty of trying to establish true democratic traditions when the underlying social and economic structures of our society do not exist.

We do not need to look only to sociology or to current world events. We can look to a tradition deep in American constitutional law that reflects the same insight. It is a tradition that I refer to as the republican tradition, republican with both a small and a capital *r*, because it was the vision of Abraham Lincoln's Republican Party in the 1860s (and before it, the Free Soil Party),

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of Thomas Jefferson and the Democratic Republicans, and ultimately of a republican commonwealth tradition in England associated most prominently with James Harrington.

What is this republican tradition? The republican tradition is basically one in which there is a recognition that in order for one truly to be a citizen in a democracy and to participate in its democratic process, one needs a minimum amount of independence. Economic independence is necessary if the citizen is to be able to deliberate on the common good, the *res publica*, the thing public. Hence, the word "republicanism." According to this tradition, the problem of poor people is that, in a real way, they have no wills of their own. You may give them the right to vote perhaps, but they will alienate that right. They will sell it to rich people or to foreign tyrants. They lack some minimal stake in society sufficient to connect their own personal interests with that of the larger public interest. This is one of the reasons that Thomas Jefferson was so concerned about cities and so hostile towards them. He saw cities as breeding grounds for a kind of urban proletariat that had no real stake in the common venture.

I have been talking about property thus far. We can also consider military service as a substitute; an alternative way of demonstrating that one has a commitment to and stake in society. The participation of many people in the revolutionary war led to a feeling that they should not be disenfranchised, disintitled to participate in public deliberations, just because they did not meet the property requirements of the time. This led to various land reform movements, including the abolition of primogeniture and entail. Lincoln's ultimate decision to propose a thirteenth amendment to emancipate blacks was in large part triggered by the fact that blacks had served as soldiers. Look, in fact, at section three of the fourteenth amendment. The definition of the presumptive voting body of the states is identical to that of the militia — males over twenty-one. Or consider the twenty-sixth amendment adopted in 1971 extending the franchise to eighteen year olds who were at the time bleeding and dying for this country.

In short, there is the republican vision that Thomas Jefferson had of the yeoman farmer standing on his own land, pitchfork in one hand, able to provide for himself and his family, with a musket in his other hand, capable of serving the militia and defending his country. There is in this vision a strong hostility to the notion of a standing army, a mercenary army. The standing army is dependent; it is paid by the government. The same kinds of intuitions that many people today have about bureaucracy, welfare, and dependency on government, I think, were held by the framers and illustrated by their concern about standing armies and mercenary armies.

I suggest that there are two basic ways of dealing with the republican notion that in order for a democracy to work people must have a stake in society. The first is the underside, the dark side of the republican vision. It is the *exclusionary* side. It is the Athenian solution, and I would suggest it is the original American solution. That solution is to enslave people, to ruthlessly disenfranchise people who do not have property, and to adopt poll taxes and property qualifications.

Indeed human slavery led to a host of “economic rights” provisions in the original Constitution. We see it over and over again. We see it in the two clauses about non-importation of slaves. We see it in the fugitive slave clause. We see it in the three-fifths rule. And it is lurking in the background of several other clauses in the Constitution. This is dramatic evidence that “economic rights” are not *per se* a good thing. We need to ask questions about their distribution: *Who* has economic rights and to how much?

Edmund Morgan in his brilliant book called *American Slavery, American Freedom*<sup>1</sup> elaborated on the seeming paradox of the fact that you have radical language about liberty, equality, and the rights of man coexisting in the same society that enforces a regime of human slavery. But in an odd way it is not a paradox at all because it is the enslavement of many people that provides the economic well-being of the rest, who constitute the polity. Ironically, slavery provides a rough equality among whites — they are all equal in being *free* men — and enough economic rent to allocate to poor whites to make them economically independent.

But this original republican solution was radically modified by the Civil War and the thirteenth amendment. There is a new solution to the problem. It is no longer the Athenian solution of enslavement. It is an *inclusionary* solution. It is a solution that says that we will not allow a degraded caste of people to exist in our society. It is a solution that provides inalienable property rights of people in their own persons. Moreover, I suggest that it is a vision that provides for, especially under section two of the thirteenth amendment, forty acres and a mule. It is a vision that provides for a right to sustenance and shelter — minimum sustenance, minimum shelter.

I submit that standard legal discourse has deradicalized this thirteenth amendment vision, the inclusionary vision. The people who adopted the thirteenth amendment provided rights against the world. A Martian looking at our Constitution would probably see the thirteenth amendment as its most radical provision. There is no state action requirement, unlike just about every other provision in the Constitution. We fought a civil war over this. It radically changed the social and economic structure of society. The people

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1. E. Morgan, *American Slavery, American Freedom* (1975).

who adopted it did not know that the fourteenth and fifteenth amendments were going to follow. They thought the thirteenth amendment was quite broad.

I suggest that when the reconstruction amendments are viewed as a whole, a radically different vision of society emerges. Precisely because the fifteenth amendment gave former slaves the right to vote, and the fourteenth amendment made them citizens by dint of their birth, you have to make sure that they will have a certain minimum stake in society with the thirteenth amendment. Otherwise you could not trust them to be voters under the fifteenth amendment.

Thaddeus Stevens, for example, had a policy of subsidized public education, of land redistribution in the South — forty acres and a mule — and of homesteading in the West.<sup>2</sup> You can see connections now between the educational vision of *Brown v. Board of Education*<sup>3</sup> and Thaddeus Stevens in the Reconstruction. What does this suggest about the principles of prospectivity and generality that I began with?

One thing is that some of these new economic rights provisions are slightly redistributive. Abolishing primogeniture and entail changed the cluster of existing Lockean property rights. Land reform in the South was redistributive. Public education in some ways may be redistributive as well. Wealthy people pay more school taxes than poor people, but poor children are no less entitled to public education. In the West, we did not auction off lands to the highest bidder. There was a distributional vision behind the homesteading provisions of giving subsidized land to folks as long as they were going to farm their own homestead.

What happens when there is no longer any land left?<sup>4</sup> I suggest that there is a connection between the “safety valve” of Western land one hundred years ago and language about the “safety net” today, about trying to create situations in which everyone has a minimum stake in society. It is very interesting that soon after the closing of the West in 1890, Americans adopted the sixteenth amendment which provides not simply for an income tax, but a predictively progressive — that is, a redistributive — income tax.

Professor Epstein made a nice set of arguments about how the original understanding and the structure of the Constitution was anti-redistributive. His argument as I understand it is not so much textual as structural, looking at the ideological background of the framers of the Constitution. But if you are going to do that for the original Constitution — engage in that level of

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2. This is similar to what is going on in Central America today with thoughts about land redistribution in order to provide the social basis for a democracy.

3. 347 U.S. 483 (1954).

4. The availability of such land was explicitly assumed by Locke's famous proviso.

generality in constitutional interpretation — to be consistent, to be a principled interpretivist, you have to be willing to do the same thing when looking at the thirteenth, fourteenth, and fifteenth amendments or the sixteenth amendment, and recognize that they were motivated by a slightly different vision of economics and democracy.

I will end with two caveats and then try to come full circle. First, a notion of minimal entitlements is not a notion that everyone should have an equal amount of property. It is more a thirteenth amendment vision rather than a fourteenth amendment vision. Second, this vision is not a socialist one. It celebrates the notion of private property, but suggests that we have to extend the benefits of that to all citizens in society, or at least extend the benefits of some minimum property entitlement. This is the vision of Charles Reich in his classic article on the new property.<sup>5</sup> It might suggest implications for the *Rodriguez*<sup>6</sup> case dealing with a minimum right to education, or for voucher systems in employment or education, not necessarily a kind of socialist system in which people have property rights in other's income.

So we started with three principles — prospectivity, generality, and nondiscrimination. My claim is that each one of these has to be importantly qualified or modified. Prospectivity has to be complemented by a vision of the substantive baseline. Prospectivity simply says whatever existing property rights you have, must be respected prospectively, but we need a theory about initial baseline entitlements, starting points. We need a theory about the birthrights of inheritance of every American citizen. That is what the thirteenth, fourteenth, and fifteenth amendments are all about — birthrights of every American citizen.

The proposition about generality must be supplemented by a vision of the independence of citizens. The way to create that independence is to give every citizen some minimum stake in society.

Finally, the notion of nondiscrimination, which is often assimilated to non-redistribution, has to be qualified by the need to accommodate modest redistribution so that we can make real today the vision of forty acres and a mule for every American.

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5. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

6. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

